Exhibit 7

TTAB

IN THE UNITED PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

10-15-2002

U.S. Patent & TMOfc/TM Mail Rcpt. Dt. #40

CENTRAL MFG. CO.
(a Delaware Corporation)
P O Box 35189
Chicago, IL 60707-0189

Opposer,

vs.

PARAMOUNT PARKS, INC.
8720 Red Oak Blvd.
Charlotte, North Carolina 28217

Applicant

Box TTAB/NO FEE

Opposition No: 123,765

Trademark: HYPERSONIC

Application SN: 76-103,447 and 76-103,448

Int. Class No: 16 & 25

VERIFIED MOTION FOR SUMMARY JUDGMENT[1] WITH SUPPORTING MEMORANDUM AND REQUEST FOR AN ORAL HEARING ON THE SAID MOTION §502.04[2]

TRADEMARK TRIAL AND APPEAL BOARD
02 NOV -4 PM 3:30

NOW COMES the Opposer, and hereby moves for Summary Judgment pursuant to F.R.C.P. 56 of the Federal Rules of Civil Procedure and §2.116 of the Trademark Rules of Practice in its favor, sustaining its Notice of Opposition and denying Applicant's alleged Trademark Application SN: 76-103,447 and 76-103,448, for the mark **HYPERSONIC**.

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1. Opposer also requests that the Board grant the Opposer's Motion to Extend the Page Limit for Motion for Summary Judgment. The Opposer states that it was necessary to have additional pages to its Motion for Summary Judgment in order to fully inform the Board of the issues and facts in this case. Opposer requests that the Board grant Opposer's Motion to Extend the Page Limit under the Rules for filing motions for summary judgment and/or grant Opposer leave to file a Motion for Summary Judgment within the prescribed page limit.

2. Opposer requests an oral hearing for this motion which is completely dispositive of the case and the oral hearing is necessary to clarify the issues to be decided. Although the Board rarely grants a request for an oral hearing on a motion, the Opposer asserts in this instant, it would help serve to resolve the entire dispute as between the parties, a controversy which has been pending at the Board for over two years, and promises to go on for many more years unless the Board grants Opposer's request for an oral hearing. Since both parties reside in Chicago, Illinois, the Opposer is requesting that the Board set an afternoon hearing on any given Wednesday which may be convenient for the Board. The Opposer's Fall and Spring schedule precludes his availability on all days but Wednesdays.

1. This motion is made on the numerous grounds including that Application SN: 76-103,447 and 76-103,448 consist of or comprise of a mark HYPERSONIC, which is confusingly similar to Opposer's mark *HYPERSONIC* or tradename previously used in the United States and not abandoned, as to be likely when applied to the goods of the Applicant, *t-shirts, sweatshirts, hats, jackets, pajamas, masquerade costumes, tank tops, footwear, sweatpants and shorts*, in International Class 25, and for *paper goods and printed matter, namely, calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, postcards, gift wrapping, bumper stickers, and rubber stamps*, in International Class 16, to cause confusion or mistake or deception.

2. The Opposer moves for the Board to sustain Opposer's opposition because the Applicant is not the owner of the marks applied for.

3. The Opposer moves for the Board to sustain Opposer's opposition because the Applicant had no valid intent to use in commerce.

4. The Opposer moves for the Board to sustain Opposer's opposition because the Applicant has not established a valid first use date.

5. The Board should sustain Opposer's opposition because Applicant's specimens of use were for a design mark and not for the mark, as illustrated in the drawing, and as applied for in the said applications.

6. The Opposer moves for the Board to sustain Opposer's opposition because of Applicant's unlawful or improper use in commerce.

7. The Board should sustain Opposer's opposition because Applicant's marks were not applied for in their correct type.

8. The Board should sustain Opposer's opposition because the Applicant's statement of use is a misrepresentation on the Board, because the Applicant had never used its marks on the goods in question on its alleged Intent to Use use dates.

9. The Board should sustain Opposer's opposition because the Applicant's amendments to allege use are a misrepresentation on the Board, because the Applicant had never used its marks on the goods in question on its alleged first use dates.

10. The Board should sustain Opposer's opposition because the Applicant, PARA-

MOUNT PARKS, INC. failed to disclose the relationship that exists between VIACOM, INC., that owns the said mark HYPERSONIC, and the subsidiary, PARAMOUNT PARKS, INC. Such failure to disclose, under TMEP §1201.03(c), is fatal to Applicant's said application. The Board must, as a matter of law, deny registration to the Applicant, for failing to disclose under §1201.03(c) TMEP. See also §802.01 TMEP.

11. The Board should sustain Opposer's opposition based upon the facts revealed in the Applicant's responses to Opposer's discovery.

12. The Opposer also lays out additional grounds in the foregoing motion which support all of the central allegations contained in Opposer's Notice of Opposition which support the denial of Applicant's said applications.

13. In the matter of Intent to Use Application SN: 76-103,447; Filed: August 2, 2000; Published Date: May 22, 2001, for the mark HYPERSONIC, Int. Cl. 25 for namely, *t-shirts, sweatshirts, hats, jackets, pajamas, masquerade costumes, tank tops, footwear, sweatpants and shorts;* and First Use Application SN: 76-103,448; Filed: August 2, 2000; Published Date: April 24, 2001, for the mark HYPERSONIC, Int. Cl. 16 for namely, *paper goods and printed matter, namely, calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, postcards, gift wrapping, bumper stickers, and rubber stamps.*

14. The Opposer, hereinafter referred to as ("*HYPERSONIC*") like McDonald's Corporation, uses it's well known *HYPERSONIC* mark as a trade name, corporate name, service mark and trademark[1] since at least as early as 1988 as a Predecessor-in-Interest, and is

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1. **§16.13 McCARTHY ON TRADEMARKS, II. Ownership. Who Is Owner Of Trademark, [1] Introduction,** Trademarks have often been held to be a kind of "property." In discussing "ownership of a trademark, we must recognize that we are dealing with intangible, intellectual property. "Ownership" means that one possesses a right which will be recognized and upheld in the courts: To say one has a "trademark" implies ownership and ownership implies the right to exclude others. If the law will not protect one's claim of right to exclude others from using an alleged trademark, then he does not own a "trademark", for that which all are free to use cannot be a trademark. Application of Deister Concentrator Co., 48 CCPA 952, 289 F.2d 496, 129 USPQ 314 (1961). Trademark ownership inures to the legal entity who is in fact using the mark as a symbol of origin. The Federal Trademark Register can be rectified in order to correct the ownership of a registered mark or a pending application. Chapman v. Mill Valley Cotton, 17 USPQ2d 1414 (TTAB 1990) (Opposer Alpha alleged that she, not applicant, owned the mark. Applicant was a joint venture composed of parties Alpha and Beta. After

15. The Opposer also holds common law rights in the mark *HYPERSONIC* on numerous goods, including *sports racquets, namely tennis racquets, racquetball racquets, golf clubs, golf balls, tennis balls, sports balls, namely, basketballs, baseballs, footballs, soccerballs, volleyballs, crossbows, tennis racquet string and shuttlecocks,* and has priority of use on similar, competitive and related goods, See Registration No: 1,593,157, and therefore opposes registration of the confusingly similar mark HYPERSONIC , Intent to Use Application SN 76-103,447 in Int. Cl. 25 and Application SN 76-103,448 in Int. Cl. 16.

16. Opposer has used the mark *HYPERSONIC* itself, through it's predecessor in interest, on a broad range of goods and services and holds rights, *inter alia.*

17. The Opposer's mark *HYPERSONIC* is well-known and is associated with the Opposer. Applicant's said Applications for the mark HYPERSONIC will dilute Opposer's famous *HYPERSONIC* trademark.

18. If the Board factors in the case doctrine of *Sands, Taylor & Wood*[1] that generally a Trademark holder is not only entitled to the rights held on the goods that it's registration covers, but is also entitled to hold rights on goods that are closely related and if the Board were to factor in the Opposer's equation of rights held in it's *HYPERSONIC* mark enumerated by *Sands, Taylor,* the Board must conclude that the Applicant's use of the identical mark HYPERSONIC is likely to be confused with Opposer's use of its *HYPERSONIC* marks, on the goods listed in the said Registration, as well as on the common law rights held by Opposer. As such, the Board, as a matter of law, must deny Applicant registration of the mark sought to be registered.

...Continued...

some litigation in state court, the parties filed an assignment from party Beta to party Alpha amounting to a concession that Alpha was indeed the owner of the mark. The Board viewed the TLRA 1989 amended version of §18, which permits rectifying the "register" as broad enough to include changing the name of the owner of an application, as well as of an issued registration.

1. *Sand, Taylor & Wood v. Quaker Oats Co.,* 978 F.2d 947, 24 USPQ2d 1001, 1010 (7th Cir. 1992) A "closely related product is one which would reasonably be thought by the buying public to come from the same source, or though to be affiliated with, connected with, or sponsored by, the trademark owner."

FACTUAL BACKGROUND:

19. The Applicant has filed a total of seven (7) trademark applications containing the mark HYPERSONIC. Two (2) of the seven applications, which are the subject of this Opposition, Application SN: 76-103,447 and 76-103,448, were for the solo word mark HYPERSONIC, in a block letter format, as indicated on the drawing pages of the said trademark applications marked as **Exhibits[1] 1 and 2**, respectively.

The other five (5) HYPERSONIC formative trademark applications are as follows:

20. The Applicant filed Application SN: 76-138,150 in International Class 21, for the mark HYPERSONIC XLC XTREME LAUNCHER COASTER & Design for *plastic cups, mugs and beverage glassware*. Applicant's said Application is attached hereto and marked as **Exhibit 3.**

21. The Applicant filed Application SN: 76-138,156 in International Class 28, for the mark HYPERSONIC XLC XTREME LAUNCHER COASTER & Design for *coin-operated pinball games machines, board games, poseable play figures, dolls, toy model hobby craft kits composed of plastic, vinyl and resin molds, jigsaw and manipulative puzzles, toy action figures, toy vehicles, kites, yo-yos, balloons, toy banks, costume masks, hand puppets, crib mobiles, mobiles for children, and plush toys*. Applicant's said Application is attached hereto and marked as **Exhibit 4.**

22. The Applicant filed Application SN: 76-138,159 in International Class 41, for the mark HYPERSONIC XLC XTREME LAUNCHER COASTER & Design for *entertainment services, namely, an amusement park ride and attraction*. Applicant's said Application is attached hereto and marked as **Exhibit 5**.

23. The Applicant filed Application SN: 76-138,161 in International Class 16, for the mark HYPERSONIC XLC XTREME LAUNCHER COASTER & Design for *paper goods and printed matter, namely calendars, fiction magazines, comic books, greeting cards, posters, trading cards, stickers, notepads, notebooks, postcards, gift wrapping paper, bumper stickers,*

1. The Applicant has tendered to the Opposer, true and correct copies of Applicant's said applications and attached amendments to alleged use with attached declarations.

rubber stamps. Applicant's said Application is attached hereto and marked as **Exhibit 6**.

24. The Applicant filed Application SN: 76-138,160 in International Class 25, for the mark HYPERSONIC XLC XTREME LAUNCHER COASTER & Design for *sweatshirts, hats, jackets, pajamas, masquerade costumes, tank tops, footwear, sweatpants, ,shorts*. Applicant's said Application is attached hereto and marked as **Exhibit 7**.

25. The Applicant in Application SN: 76-103,447 and 76-103,448, submitted a drawing showing the mark applied for as the solo word mark HYPERSONIC. There was no design component, as indicated in Applicant's other said applications.

APPLICANT IS NOT THE OWNER OF THE MARK

26. Applicant's application is void because the wrong party was identified as the Applicant. See §1201.02(b).

27. The proper party to apply for the registration of the said mark was **VIACOM, INC.**. The only party to apply for registration of a mark is the party who owns the mark. 15 U.S.C. §1051. While it is common for any party involved in a related-company relationship to be referred to as a "related company," use of the mark inures, for ownership purposes, to the benefit of the party which does the controlling, **VIACOM, INC.**. This party is the owner of the mark and, therefore, is the only party that should have applied to register the said mark. See §1201.01. And §1201(b) - Application Void if Wrong Party Identified as the Applicant. The Applicant must be the owner of the mark for which registration is requested. If the applicant does not own the mark on the application filing date, the application is void. *See Huang v. Tzu Wei Chen Food Co. Ltd.,* 849 F.2d 1458, u USPQ2d 1335 (Fed. Cir. 1988). An application filed by a party other than the owner of a mark is invalid, and this defect cannot be cured by amendment or assignment because the applicant did not have the right to apply on the assigned filing date. *See* TMEP §§706.01 and 802.06.

1201.03(a)(i) Disclosure of Related-Company Use in §1(a) Application [R-1]

28. In a related-company situation, the party, VIACOM, INC., who controls the nature and quality of the goods or service with which the mark is used, and who is thereby the

owner of the mark, should have been set out in the said application as the applicant. This was **not** done in the case at bar. The said application is fatally flawed because the said application is void *ab initio*, as it identifies the wrong party as the owner of the said Application, PARAMOUNT PARKS, INC., when the real owner of interest is VIACOM, INC.

29. The following is an example of a non-correctable error in identifying the applicant. *See* TMEP §1201.02(b)(3): If an application is filed in the name of corporation A when in fact a sister corporation, corporation B, owns the mark, the application is void as filed because the applicant is not the owner of the mark, as is in the case at bar. The Board must sustain Opposer's opposition because in the said application, the Applicant was the wrong Applicant. The mark should have been applied for in the correct name, VIACOM, INC..

30. Applicant PARAMOUNT PARKS, INC. failed to disclose the relationship that exists between VIACOM, INC., the owner of the said mark HYPERSONIC, and the subsidiary, PARAMOUNT PARKS, INC. Such failure to disclose, under TMEP §1201.03(c), is fatal to Applicant's said application. The Board must, as a matter of law, deny registration to the Applicant, for failing to disclose under §12.01.03(c) TMEP.

31. Applicant's said statement of use, under the Declaration, contains a statement verifying that the Applicant, (PARAMOUNT PARKS, INC.) is the owner of the said trademark when it is clear from the record that the actual owner and creator of the HYPERSONIC trademark, and the entity that designed and controls the quality of the product sold under the said HYPERSONIC trademark, is VIACOM, INC.

APPLICANT HAD NO VALID INTENT TO USE IN COMMERCE

32. "In an intent to use application, under §1(b), 15 U.S.C. §1051(b), the applicant must assert a bona fide intention to use the mark in commerce on or in connection with the identified goods or services.

Prior to registration, the applicant must file an allegation of use, either an amendment to allege use under 37 C.F.R. §2.76 or a statement of use under 37 C.F.R. §2.88, which includes the applicant's assertion of use of the mark in commerce on or in connection with the goods or specimens specified, noting the type of commerce, and, for each class, the dates of

first use, three specimens evidencing such use and an indication of the mode or manner of use. Allegations of use must be timely, must include the required fee and must be supported by an affidavit or by a declaration in accordance with 37 C.F.R. §2.20. See TMEP §§902 and 903." See TMEP, §202.03(b), at page 200-4.

33. The Applicant had no bona fide intent to use the marks in commerce, which are the subject of this Opposition.

Use In Commerce:

"The power of the federal government to register trademarks comes from the commerce clause of the Constitution. Section 1 of the Trademark Act, 15 US.C. §1051, permits application for registration of 'trademark used in commerce' (15 U.S.C. §1051(a)) or of a trademark which a person has a bona fide intention to use in commerce (15 U.S.C. §1051(b)). Regarding issues relating specifically to applications under §1 of the Act, see TMEP Chapter 900.

Section 45 of the Act, 15 U.S.C. §1127, defines "commerce" as follows:

The word "commerce" means all commerce which may lawfully be regulated by Congress.

Thus, the scope of federal trademark jurisdiction is all commerce which the United States Congress may lawfully regulate. Types of commerce encompassed in this definition are interstate, territorial, and between the United States and a foreign country. A purely intrastate use is considered insufficient to establish a federal jurisdictional basis for registration of a mark." See TMEP, §1202.01, at page 1200-26.

APPLICANT HAS NOT ESTABLISHED A VALID FIRST USE DATE

34. The Opposer's alleges that the Applicant's first use date amounted to a misrepresentation on the Patent and Trademark Office in order to obtain a trademark application. Applicant has provided this Board with no corroborating evidence and/or persuasive evidence that Applicant's alleged first use date of March 17, 2001, was anything more than a fabrication on the PTO in order to obtain a trademark registration and/or a mere attempt at a pre-

marketing tactic that attempted to "reserve" the HYPERSONIC mark. *See* Zazu Designs v. L'Oreal,, 979 F. 2d at 503, 505 "Only active use allows consumers to associate a mark with particular goods and notifies other firms that the mark is so associated; reserving a mark is forbidden" dispensing a few sample products is a "pre-marketing maneuver" that is insufficient to confer trademark rights".

35. At common law, ownership of a trademark is obtained by actual use of a symbol to identify the goods or services of one seller to distinguish them from those offered by another. *See* McCarthy on Trademarks and Unfair Competition §§ 3.01, 9.01, 16.02 and 16.03. The ownership of a mark between different entities is governed by priority of use. See *Id* at §16.02. The first seller to use the mark in the sale of goods or services is the "senior user" and "owner" of the mark. See *Id* A ...trademark...comes into being as soon as it is affixed and the goods are sold[1]...Priority of user alone is controlling"*See* Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 294,131, USPQ 55 (end Cir. 1981).

36. Applicant's Statement of Use was false. Applicant did not have use on the date that it stated in its Statement of Use. The Applicant had not used its mark in commerce on the date that it stated in its Statement of Use and that the declaration attached to the Statement of Use was false.

37. Applicant's said statement of use, stating that the mark was first used anywhere at least as early as March 17, 2001, and the date of first use in commerce of at least as early as March 17, 2001, is false.

CONFORMITY BETWEEN THE DRAWINGS AND THE SPECIMENS

38. In the said Intent to Use Applications 76-103,447 and 76,103,448, which the subject of this Opposition, "there can be no ambiguity in the application as originally filed, since a specimen is not submitted with the original application. Accordingly, if the mark shown in the specimen filed with the statement of use or amendment to allege use is materially

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1. From the evidence that the Registrant has attempted to introduce, they have not attempted to introduce any evidence of actual use of their alleged mark in this record. Not one scintilla of actual evidence of actual use.

different from the mark shown in the drawing, Applicant will not be allowed to conform the drawing to the mark as used in the specimen.[1]" See *In re Finlay Fine Jewelry Corp.*, 41 U.S.P.Q.2d 1152, 1154 (TTAB 1996).

"The mark in the drawing must agree with the mark as used on the specimens in an application under §1 of the Trademark Act, 15 U.S.C. §1051, or as applied for or registered in a foreign country in an application under §44, 15 U.S.C. §1126. See 37 C.F.R. §2.51; TMEP §807.

The drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods or services, in a §1(b) application (37 C.F.R. §2.51(a)(2) and 2.51(b)(2), and must be a substantially exact representation of the mark as used on or in connection with the goods or services, in a §1(a) application (C.F.R. §2.51(a)(1) and 2.51(b)(2). Thus, under §1, an applicant may apply to register any element of a composite mark used on the specimens, or intended to be used, as appropriate, if that element presents, or will present, a separate and distinct commercial impression as a mark. *See In re Chemical Dynamics, Inc.*, 839 F.2d 1569, 5 USPQ2d 1828 (Fed. Cir. 1988) (refusal to register medicine dropper and droplet affirmed because this matter did not create a distinct commercial impression as used on the specimens). *In re Raychem Corporation*, 12 USPQ2d 1399 (TTAB 1989) (refusal to register "TINEL-LOCK" based on specimens showing "TRO6AI-TINEL-LOCK-RING" reversed)". See TMEP, §807.14, at page 800-71.

"The situation in which a drawing is an incomplete representation of a mark, because of the omission of essential and integral matter, is sometimes referred to as a 'mutilation' of the mark.

The mere fact that two or more elements form a composite mark does not necessarily mean that those elements are inseparable for registration purposes. The determinative factor is whether or not the subject matter in question projects a separate and distinct commercial impression in relation to the other element(s). See *In re Semans*, 193 USPQ 727 (TTAB 1976)

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1. Guide to Register Trademarks by Bazerman & Drangel, Aspen Law & Business, at page 4-97. Copyright 1999.

("KRAZY" held an integral part of the unitary phrase "KRAZY MIXED-UP" and, therefore, not a distinct mark).

As noted in TMEP §807.14, an applicant may not amend a drawing to overcome an objection related to the agreement between the mark in the drawing and the mark as shown on the specimens or foreign certificate, if the amendment would result in a material alteration. For example, if an applicant applies to register distinct elements which do not form a unitary commercial impression, the applicant would be precluded from amending to add matter later if such addition would result in a material alteration. See 37 C.F.R. §2.72(a); TMEP §807.14(a). See TMEP, §807.14(b), at page 800-77.

39. It is critical for the Board to note and examine that Applicant's drawings for the said Application SN: 76-103,447 and 76-103,448 are for the solo word mark HYPERSONIC, with no design component. If the Board examines Opposer's Exhibits 1 and 2, and examines Applicant's specimens of use attached to their said Declaration of Use for the two Applications, the Board will see that the Applicant has submitted a design mark which represents a mutilation or incomplete representation of the solo word mark HYPERSONIC, as shown in Applicant's said applications. Such an error is fatal to Applicant's said applications, and the Board must grant Opposer judgment and sustain its Opposition, on the grounds that Applicant's said specimens of use represent a mutilation or incomplete representation of the said HYPERSONIC marks applied for.

APPLICANT'S UNLAWFUL OR IMPROPER USE IN COMMERCE

40. In order for a use in commerce to be considered for a basis for Federal Registration, it must be lawful use in commerce. Applicant did not have a valid intent to use the mark in commerce when the Applicant filed its applications. Applicant's counsel for VIACOM, INC., Mallory D. Levitt, stated in a letter, dated April 3, 2001, (Applicant's goods) are offered for sale solely within the park's onsite souvenir and gift shop near the ride[1]. See a true

1. Applicant was referring to merchandise that is sold or to be sold in a park located within the State of Virginia, in a town called Doswell. "A purely interstate use is considered insufficient to establish a federal jurisdictional basis for registration of a mark." See TMEP, §1202.01, at page 1200-26.

and correct copy of Mallory Levitt's April 3, 2002 letter, attached hereto and marked as **Exhibit 8**. Applicant, in response to Opposer's Interrogatories, Response No. 3, states that "all of the goods bearing the HYPERSONIC marks are sold only at PARAMOUNT'S Kings Dominion Theme Park in Virginia, which opened to the media this year on March 22, 2001, and to the public on March 24, 2001." See a true and correct copy of Applicant's Response to Interrogatory No. 3, marked as **Exhibit 9.**

41. Applicant's said applications are void *ab initio* because the Applicant did not have a bona fide intent to use the mark in commerce when they filed their said applications. The Applicant did not have actual use in commerce when they filed their Statements to Amend Use. Applicant did not have actual use in commerce on the mark HYPERSONIC, sought to be registered, because the specimens of use represented a material alteration of the mark. Thirdly, Applicant had no valid use in commerce, pursuant to the Amendment to Allege Use, attached to Exhibits 1 and 2. Applicant's Amendment to Allege Use, for Application SN: 76-103,447, dated the 24th day of October, 2001, states that "the mark was first used on or in connection with t-shirts, sweatshirts, tank tops and hats at least as early as March 17, 2001, and is now in use on such commerce." Applicant's application SN: 76-103,447 stated that the Applicant had a valid Intent to Use on the following goods: t-shirts, sweatshirts, tank tops and hats, jackets, pajamas, masquerade costumes, footwear, sweatpants and shorts. Applicant, in violation of the Trademark Rules, attempted to amend its application listing its goods during the pendency of an Opposition. This is a clear violation of the Trademark Rules. Applicant's application is fatally defective and the Board must grant Opposer's Motion for Summary Judgment, denying the Applicant registration of its Application SN: 76-103,447. Applicant has established that it did not have a bona fide intent to use the mark in commerce. Applicant did not have a valid bona fide intent to use the mark on all of the goods listed in Application SN: 76,103,447. In fact, Applicant, through its amendment to allege use, for Application SN: 76,103,447, attempted to amend its application during the pendency of an Opposition, in violation of Trademark Rule §2.133(a), by deleting the following goods: jackets, pajamas, masquerade costumes, footwear, sweatpants and shorts from its application. Furthermore, Applicant's alleged specimen of use, attached to its Amendment to Allege Use, is a design mark

which is not the same mark, solo word mark HYPERSONIC in block letters, that the Applicant applied for. Therefore, Applicant had no use contrary to its said Amendment to Allege Use.

In addition, Applicant stated that its First Use date in interstate commerce, and in use, as March 17, 2001. This represents a misrepresentation on the Board, in that Applicant states in its Interrogatories, Response to Interrogatory No. 11: "that such goods have been sold at those outlets since the park opened on March 24, 2001. See a true and correct copy of Applicant's Response to Interrogatory No. 11, attached hereto as **Exhibit 9**. Thus, Applicant's Amendment to Allege Use represents a complete misrepresentation on the Board, which is sufficient for the Board to grant Opposer's its Motion for Summary Judgment.

42. Applicant's said applications are void *ab initio* because the Applicant did not have a bona fide intent to use the mark in commerce when they filed their said applications. The Applicant did not have actual use in commerce when they filed their Statements to Amend Use. Applicant did not have actual use in commerce on the mark HYPERSONIC, sought to be registered, because the specimens of use represented a material alteration of the mark. Thirdly, Applicant had no valid use in commerce, pursuant to the Amendment to Allege Use, attached to Exhibits 1 and 2. Applicant's Amendment to Allege Use, for Application SN: 76-103,448, dated the 24th day of October, 2001, states that "the mark was first used on or in connection with postcards and bumper stickers at least as early as March 17, 2001, and is now in use on such commerce." Applicant's application SN: 76-103,447 stated that the Applicant had a valid Intent to Use on the following goods: calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, gift wrapping paper and rubber stamps. Applicant, in violation of the Trademark Rules, attempted to amend its application listing its goods during the pendancy of an Opposition. This is a clear violation of the Trademark Rules. Applicant's application is fatally defective and the Board must grant Opposer's Motion for Summary Judgment, denying the Applicant registration of its Application SN: 76-103,448. Applicant has established that it did not have a bona fide intent to use the mark in commerce. Applicant did not have a valid bona fide intent to use the mark on all of the goods listed in Application SN: 76,103,448. In fact, Applicant, through

its amendment to allege use, for Application SN: 76,103,448, attempted to amend its application during the pendency of an Opposition, in violation of Trademark Rule §2.133(a), by deleting the following goods: jackets, pajamas, masquerade costumes, footwear, sweatpants and shorts from its application. Furthermore, Applicant's alleged specimen of use, attached to its Amendment to Allege Use, is a design mark which is not the same mark, solo word mark HYPERSONIC in block letters, that the Applicant applied for. Therefore, Applicant had no use contrary to its said Amendment to Allege Use.

In addition, Applicant stated that its First Use date in interstate commerce, and in use, as March 17, 2001. This represents a misrepresentation on the Board, in that Applicant states in its Interrogatories, Response to Interrogatory No. 11: "that such goods have been sold at those outlets since the park opened on March 24, 2001. See a true and correct copy of Applicant's Response to Interrogatory No. 11, attached hereto as Exhibit 9 Thus, Applicant's Amendment to Allege Use represents a complete misrepresentation on the Board, which is sufficient for the Board to grant Opposer's its Motion for Summary Judgment.

Since the Applicant is not permitted to amend its application without permission during the pendency of its application, and since the Applicant attempted to amend its application without permission, by deleting goods that it otherwise claimed it had a bona fide intent to use, Applicant has voided its own Applications SN: 76,103,447 and 76,103,448, on its own.

SAID APPLICATION WAS NOT APPLIED FOR IN ITS CORRECT TYPE

43. It is critical that a mark be registered according to its correct type for, if it is not, the registration may be subject to cancellation. *See National Trailways Bus System v. Trailway Van Lines, Inc.*, 222 F. Supp. 143, 139 USPQ 54 (E.D.N.Y. 1963), and 269 F. Supp. 352, 155 USPQ 507 (E.D.N.Y.1965). See §109 of the TMEP.

44. Opposer moves to deny Applicant's mark *HYPERSONIC* on numerous grounds[1]

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1. Opposer, after participating in Applicant's testimony deposition, may have discovered additional grounds for the said Opposition and moves this Honorable Board for leave to amend it's Notice of Opposition conform to the said evidence presented herein.

including priority of use, likelihood of confusion, misrepresentation on the PTO etc.; on the trademark office. Opposer has met it's burden of proof on all of the grounds that it has alleged and is entitled to have the Board deny Applicant's application. The Opposer has established priority of use of the mark *HYPERSONIC*. The Opposer has established priority of use of the mark *HYPERSONIC* on similar, competitive and closely related goods; *namely, sporting goods*, and the Opposer has established that the Applicant has made misrepresentations to the PTO in order to acquire its mark.

STATEMENT OF USE IS A MISREPRESENTATION ON THE PTO

45. The Opposer asserts that the Board should grant its Motion for Summary Judgment based also upon Applicant's said Statement of Use, which is a misrepresentation on the PTO. Said Statement of Use in and of itself, vitiates Applicant's said application for containing the said misrepresentations:

46. The first reason the Board must deny Applicant's said applications is that the specimens of use contain the work mark HYPERSONIC. Consequently, the said specimen of use is not for the solo word mark HYPERSONIC, but for a design mark HYPERSONIC.

47. The alleged specimen of use is inconsistent with the said Trademark Application for the solo word mark HYPERSONIC because it does not convey a separate and distinct commercial impression as a mark. *See In Re Chemical Dynamics, Inc.* 839 F.2d 1969, 5 USPQ2d 1828 (Fed. Cir. 1988).

48. The Board must deny registration to the application, based on the undeniable fact from the record before it, that Applicant's specimen of use is not a substantially exact representation of the HYPERSONIC mark sought to be registered. The Board need proceed no further than deciding Opposer's Motion for Summary Judgment in favor of the Opposer on this issue alone.

APPLICANT'S SAID AMENDMENTS TO ALLEGE USE ARE FALSE AND A MISREPRESENTATION ON THE PTO

49. Applicant did not use the mark HYPERSONIC, pursuant to Trademark Application SN: 76,103,447 on all the said goods (t-shirts, sweatshirts, hats, jackets, pajamas, mas-

querade costumes, tank tops, footwear, sweatpants and shorts) listed in its application, at least as early as March 17, 2001.

50. Applicant did not use the mark HYPERSONIC, pursuant to Trademark Application SN: 76,103,448 on all the said goods (calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, gift wrapping paper and rubber stamps) listed in its application, at least as early as March 17, 2001.

51. It was not even possible for the Applicant to have first use of the mark HYPERSONIC, listed in its Application SN: 76-103,447 and 76-103,448 on March 17, 2001. Applicant has admitted that the goods covered under the two said applications are to be sold within the Park's on-site souvenir gift shop in Doswell, Virginia, at the Paramount Kings Dominion Theme Park. According to the Applicant's response to Opposer's Interrogatory No. 3, which confirmed that the said HYPERSONIC marks are only sold at the Paramount Kings Dominion Theme Park in Virginia, which "opened to the media this year on March 22, 2001 and to the public on March 24, 2001." According to Applicant's own admission, Paramount's King Dominion Theme Park was not even open on March 17, 2001. Secondly, Applicant only admits that in App. SN: 76,103,448 that mark was only available on the following goods, "post cards and bumpers stickers". The Applicant further admits that the goods listed in App. SN: 76,103,447 was only available on goods, namely "t-shirts, sweatshirts, tank tops and hats".

52. Therefore, by Applicant's own damning admissions, the Park was not even open on March 17, 2001, nor were all of the said goods listed in the two applications, being used in commerce on the date that the Applicant has stated, as contained in its Amendments to Allege Use, attached as Exhibits 1 and 2.

FAILURE TO DISCLOSE

53. The Applicant PARAMOUNT PARKS, INC. failed to disclose the relationship that exists between VIACOM, INC., the owner of the mark HYPERSONIC, and the subsidi-

ary, PARAMOUNT PARKS, INC. Such failure to disclose, under TMEP §1201.03(c), is fatal to Applicant's said application. The Board must, as a matter of law, deny registration to the Applicant, for failing to disclose under §12.01.03(c) TMEP

WHEREFORE, the Opposer prays that the Board grant it's Motion for Summary Judgment in favor of the Opposer and to deny the Applicant's registration of its said application, with prejudice.

Opposer's motion is supported by:

(1) Opposer's Memorandum in Support of Its Motion for Summary Judgment;
(2) Declaration of Leo Stoller;
(3) Opposer's *HYPERSONIC* Registration;
(3) Applicant's Applications and Amendments to Allege Use
(4) Applicant's discovery responses to Opposer's Interrogatories;
(5) And attached exhibits.

Respectfully submitted,

By: Leo Stoller, President
CENTRAL MFG. CO, Opposer
P.O. Box 35189
Chicago, Illinois 60707-0189
773 283-3880 FAX 708 453-0083

Dated: October 5, 2002

DECLARATION

The undersigned, Leo Stoller, declares that he is the Opposer and President of CENTRAL MFG. CO., that he is authorized to execute this document on its behalf, that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code. All documents that are hereto attached are verified as copies of original documents which purport to be what they are. Opposer declares that he is the owner of all of the said HYPERSONIC registrations that are relied upon in the Notice of Opposition. That although the Registrant of Record is CENTRAL MFG. CO., the Opposer's corporation, the PTO Rules do not require that the Owner of Record must record a notice with the Board. However, when questions of ownership arise, the PTO requires an explanation of ownership. See §502 of the TMEP - Establishing Ownership of Application or Registrations: "While it may be advisable for an applicant or registrant to record an assignment of an application or registration in the Assignment Division of the Patent and Trademark Office in view of the provisions of §10 of the Act, 15 U.S.C., §1060, concerning subsequent purchasers, neither the Act nor the rules require recordation. However, if the party taking the relevant action with respect to an application or registration is different from the applicant or registrant of record and the filing party has not recorded an assignment, the party taking the action must establish that it is the owner of the application or registration through appropriate evidence". The appropriate evidence is this said Declaration from LEO STOLLER, the creator of the mark HYPERSONIC and the Opposer herein.

By: _____
Leo Stoller, individually
CENTRAL MFG. CO., Opposer

By: _____
Leo Stoller, as President of
CENTRAL MFG. CO., Opposer

Dated: October 5, 2002

Certification of Mailing

I hereby certify that this Motion for Summary Judgment is being deposited with the U. S. Postal Service as first class mail in an envelope addressed to:

Box TTAB NO FEE, Assistant Commissioner of Parents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513

_____
Leo Stoller
October 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing MOTION FOR SUMMARY JUDGMENT WITH SUPPORTING MEMORANDUM to be served upon the Applicant by mailing a copy by first class mail, postage prepaid, addressed to:

Lance H. Koonce, III
KAY & BOOSE
One Dag Hammarskjold
New York, NY 10017

Leo Stoller
October 5, 2002
C:\MARKS27\PARAM.MSJ